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IN THE

Supreme Court of the United States

October Term, 1981

WARREN M. ANDERSON,
JAY P. ROLISON, JR.,
JAMES L. EMERY, and the
SENATE OF THE STATE OF NEW YORK,
Appellants,

v.

JOHN FLATEAU, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did the federal district court below err by imposing a deadline on the New York legislature to enact a reapportionment plan by April 16, 1982, when that deadline was not based on consideration of whether the legislature had, in fact, been given a reasonable opportunity to enact its own reapportionment plan, but was based simply on the date of the forthcoming primary elections?

2. Did the deadline imposed by the court below give the New York legislature a reasonable opportunity to devise and enact a reapportionment plan in light of various technical, legal and political problems involved in reapportionment?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below in the United States District Court for the Southern District of New York are John Flateau, Robert V. Connelly, Audrey Bynoe and Angel A. Rodriguez, and all persons similarly situated, Stanley Fink, both individually and as Speaker of the Assembly of the State of New York, plaintiffs below; Puerto Rican Legal Defense and Education Fund, Inc., Jack John Olivero, and Manfred Ohrenstein, both individually and as minority leader of the New York State Senate, plaintiff-intervenors below; Warren M. Anderson, both individually and as Temporary President and Majority Leader of the New York State Senate, Jay P. Rolison, Jr., both individually and as Co-Chairman of the Legislative Task Force on Reapportionment, the Senate of the State of New York, Melvin Miller, both individually and as Co-Chairman of the Legislative Task Force on Reapportionment, the Assembly of the State of New York, Hugh L. Carey, both individually and as the Governor of the State of New York, Mario M. Cuomo, both individually and as Lieutenant Governor of the State of New York and as Presiding Officer and President of the Senate of the State of New York, the Legislative Advisory Task Force on Reapportionment and the Board of Elections of the State of New York, defendants below; James L. Emery, both individually and as minority leader of the New York State Assembly, defendant-intervenor below.

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SENATE OF THE STATE OF NEW YORK,
Appellants,

v.

JOHN FLATEAU, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants Warren M. Anderson, Jay P. Rolison, Jr., and the Senate of the State of New York appeal from the order of the three-judge panel of the United States District Court for the Southern District of New York dated March 26, 1982 enjoining the present State Senate and Assembly districting lines from being employed to conduct any election for terms commencing on or after January 1, 1983 and directing that New York devise and enact a reapportionment plan for the New York State Senate and Assembly by April 16, 1982.

THE OPINION BELOW

The order of the United States District Court for the Southern District of New York dated March 26, 1982 and that court's opinion dated April 2, 1982 are reprinted in the Appendix at pages A-1 and A-3,* respectively. That court's orders dated April 19, 1982 and April 23, 1982 denying motions for a limited stay of the March 26, 1982 order are reprinted in the Appendix at pages A-23 and A-25, respectively.

JURISDICTION

The order of the United States District Court for the Southern District of New York, a statutory three-judge court composed of Circuit Judge Lawrence W. Pierce, District Judge Robert J. Ward, and District Judge Vincent L. Broderick, was entered on March 26, 1982 in the exercise of its jurisdiction under 28 U.S.C. § 2284 (1976). A Notice of Appeal to this Court was duly filed in the federal district court below on April 23, 1982 (reprinted in the Appendix at A-29).

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1253 (1948) to review a decision of a statutory three-judge court upon appeal by any party from an order granting injunctive relief. This appeal is being docketed within 60 days from the filing of the Notice of Appeal on April 23, 1982.

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment XIV, Section 1 provides that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

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* Page references to the Appendix to this Jurisdictional Statement are cited as "A- ".

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The issues raised by this appeal involve the respective roles of the federal judiciary and the state legislatures in the reapportionment of state legislative districts. Appellants, the Senate of the State of New York and certain Republican officers of the New York State legislature, are appealing from a federal district court order which imposed a time limit on the New York legislature to develop a reapportionment plan based on the date when candidates for state legislative office had to file nominating petitions, and also enjoined any further elections from being held under the previous New York Senate and Assembly district lines. Appellants contend that this federal judicial intervention in the reapportionment process, which this Court has repeatedly held to be primarily a responsibility of state legislatures, was premature and unwarranted.

Appellants believe, based on prior decisions of this Court, that the state legislature should have been given a "reasonable opportunity" to achieve its own reapportionment plan before any federal intervention was permitted. Such a "reasonable opportunity" must be determined by the amount of time reasonably required by the legislature to deal with the technical, legal and political problems involved in reapportionment, and not based arbitrarily on the date set for the next primary or general election.

The lower court, while conceding that there had been "no final failure to reapportion" by the legislature (A-13), imposed its own deadline on the legislature based on the date of the primary elections and enjoined any further elections under the old legislative districting lines. It thus created a *per se* injunction totally at variance with this Court's prior decisions, and which, if allowed to stand, will create grave confusion and uncertainty in future reapportionment cases.

Prior Proceedings

This action[1] was filed in February 1982, challenging the constitutionality of New York's existing districts for the election of members of the United States Congress and the New York State Senate and Assembly based on the 1980 census data, which showed substantial population shifts. All but one plaintiff requested that the district court order New York State to enact a constitutional plan of reapportionment by April 16, 1982 and failing that, requested that the court devise a plan. One plaintiff requested an immediate, court-ordered redistricting of the state. The legislative defendants never denied their obligation to enact a new reapportionment plan in light of the population shifts shown by the 1980 census (A-13). Rather, the sole issue in this case, and on this appeal, is when and by whom such reapportionment must be accomplished.

A three-judge panel of the district court below entered an order on March 26, 1982 (A-1) directing that New York devise and enact a reapportionment plan for the State Senate and Assembly by April 16, 1982[2] and enjoining the present State Senate and Assembly districting lines from being employed to conduct any election for terms commencing on or after January 1, 1983. In its opinion, the district court concluded that it would be unconstitutional to conduct the 1982 elections under the old districting lines, holding that the Constitution required in this

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[1] *Flateau v. Anderson*, No. 82 Civ. 0876 (S.D.N.Y. filed Feb. 10, 1982), consolidated with *Puerto Rican Legal Defense & Education Fund, Inc., v. Anderson*, No. 82 Civ. 1326 (S.D.N.Y. filed Mar. 4, 1982), on Mar. 9, 1982.

[2] Appellants did not object to the district court's order of March 26, 1982 with respect to Congressional districts, where the duty to reapportion stems from Article I, § 2 of the United States Constitution. Obviously, when a census reveals that a state has lost Congressional seats, the Congressional districts in that state must be revised prior to the next Congressional election. There is no similar need for immediate revision of state legislative lines, however, and the question of when those must be revised—left open in *Reynolds v. Sims*, 377 U.S. 533, 583-85 (1964)—is precisely the issue now before this Court.

case, "immediate reapportionment" (A-19). It adopted the April 16, 1982 deadline which had been put forward by plaintiffs "because of the State political calendar and the requirements of the pre-clearance provision of Section 5 of the Voting Rights Act of 1965".[3] Although the court stated it "believed" that deadline provided the legislature with a "reasonable opportunity" to enact a plan (A-20), this finding was not based on any consideration of the technical, political or constitutional problems of reapportionment, but rather on defendants' failure to "assert that immediate reapportionment is impossible" in time for the 1982 general elections (A-19).

Shortly thereafter, however, on April 9, 1982, appellants, again stressing the difficulties involved, stated that meeting the April 16, 1982 deadline was "virtually impossible" (A-32) and asked for a limited stay of the district court's order. The motion for a stay was denied on the merits at a hearing on April 19, 1982 (A-23). At the same hearing, the court, noting that the April 16, 1982 deadline had passed without any action by the legislature, ordered a special master appointed to develop a federal court-ordered reapportionment plan to be ready by June 1, 1982, under which the 1982 elections could be conducted (A-23, A-25).

On April 23, 1982 appellants filed a Notice of Appeal to this Court (A-29) and also applied for a stay of the March 26, 1982 order of the district court below. Appellants' application for a stay was denied by Justice Thurgood Marshall on April 28, 1982 and by the Court on May 3, 1982, after having been referred by Justice William H. Rehnquist.

The New York State Legislature subsequently did enact a reapportionment plan. It was approved by Governor Carey on May 19, 1982. Pursuant to the Voting Rights Act of 1965, *as*

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[3] Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment dated March 17, 1982, p. 39. This deadline was apparently set based on the fact that June 22, 1982 was the first day to sign designating petitions for primary elections (A-12), and the court believed a legislative plan had to be ready at least 60 days prior to that date to allow time for approval by the Justice Department.

amended, 42 U.S.C. § 1973, *et seq.* (1975), that plan has now been submitted to the Department of Justice for its approval. As of this date, no decision has been made by the Justice Department. Meanwhile, the district court ordered the special master to continue work on his plan in the event the legislature's plan is not approved by the Justice Department or is otherwise rendered invalid.[4] Moreover, three actions[5] have now been filed in New York state courts challenging the legislature's plan on the ground, among others, that it violates the New York State Constitution. Another action has been filed in the federal court seeking, *inter alia*, immediate implementation of the special master's plan.[6]

Accordingly, the reapportionment situation in New York as of the date of this Jurisdictional Statement is one of uncertainty and confusion. It appears the 1982 elections will be conducted under the legislative reapportionment plan *if* Justice Department approval is received in time, and *if* that plan is not enjoined by a state court for failure to comply with state constitutional requirements. Presumably, if the legislative plan is declared invalid, the federal court will adopt the plan devised by the special master, *if* it finds that plan satisfies federal and state constitutional requirements, a subject now under consideration by that court. If neither plan is acceptable it is possible there will be no elections at all in New York this year, since the lower court has already enjoined further use of the old districting lines in the order which is the subject of this appeal. While not all of the above confusion can be ascribed to the

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[4] The plan devised by the special master was presented to the district court on June 7, 1982. By order dated June 15, 1982 that court directed the Legislative Task Force on Reapportionment and the New York State Board of Elections to develop plans in conformance with those submitted to the court by the special master.

[5] *Bay Ridge Community Council, Inc. v. Carey*, Index No. 10984/82 (Kings Co., complaint dated May 26, 1982); *In re LeBlanc*, Index No. 2151/82 (Schenectady Co., petition dated June 6, 1982); *In re Whelan*, Index No. 12124/82 (Kings Co., petition dated June 9, 1982).

[6] *Montano v. Carey*, 82 Civ. 3994 (S.D.N.Y., complaint dated June 17, 1982).

federal court's intervention, it is difficult to imagine a better illustration of why this Court has warned against unnecessary federal judicial entanglement in the reapportionment process.

THE QUESTIONS PRESENTED ARE NOVEL AND SUBSTANTIAL

This appeal concerns the proper role of federal courts in the reapportionment process where a state legislature recognizes its obligation to reapportion in light of new census data but has not yet enacted a plan. The district court in this case held that immediate federal judicial intervention was warranted in such a case and ordered a *per se* injunction prohibiting further elections under the existing legislative districting lines. It also set a deadline for the state legislature to enact a new plan based on the timing of the upcoming elections.

Appellants contend that this order was erroneous on two grounds: (1) it failed adequately to consider whether the state legislature had been given a reasonable opportunity to enact its own reapportionment plan, and (2) even if such consideration had been given, the time period involved — a mere seven months since census data first became available in usable form — did not constitute a "reasonable opportunity" in light of the technical problems involved, the various federal and state constitutional requirements, and the need, in any deliberative body, for time to negotiate and compromise.

Appellants are unaware of any other reapportionment case that has come before the Court where the federal court has intervened in the reapportionment process simply because the legislature did not act as quickly as the court desired. This Court has only approved such intervention where the legislature has enacted an unconstitutional plan or where the legislature has completely failed to act. To hold that such judicial intervention is permissible even where, as here, the legislative parties fully recognize their obligation to reapportion in conformance with the new census data, and without any showing of unreasonable delay by such parties, would give federal

courts *carte blanche* to interfere with the reapportionment process, even at its earliest stages, and is in complete disregard of this Court's repeated admonitions that reapportionment must be, first and foremost, a legislative function.

I. The Lower Court Failed Adequately To Consider Whether The State Legislature Had A Reasonable Opportunity To Enact Its Own Plan.

This Court's prior decisions consistently hold that reapportionment is primarily a legislative, not a judicial responsibility, and that even in cases, unlike this one, where a newly-enacted legislative plan is held to be unconstitutional, it is incumbent upon the court to afford the legislature a "reasonable opportunity" to develop a new plan. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978).

"From the beginning, [this Court has] recognized that 'reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.'" *White v. Weiser*, 412 U.S. 783, 794-95 (1973) (*quoting Reynolds v. Sims*, 377 U.S. at 586). *See also Burns v. Richardson*, 384 U.S. 73, 84-85 (1966). Thus, the Court has consistently "adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment." *White v. Weiser*, 412 U.S. at 795.[7]

There are important policy reasons underlying this doctrine. First, "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973).[8] Secondly, a state

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[7] *See also Mahan v. Howell*, 410 U.S. 315, 327 (1973); *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 195-201 (1972); *Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971); *Ely v. Klahr*, 403 U.S. 108, 114 (1971); *Roman v. Sincock*, 377 U.S. 695, 709-12 (1964); *Davis v. Mann*, 377 U.S. 678, 693 (1964); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964).

[8] As the Court in *Gaffney* emphasized:

> [I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that

legislature is better suited than a federal court to perform the inherently political reapportionment task, "dealing as it must with fundamental 'choices about the nature of representation' ". *Id.* at 749 (*quoting Burns v. Richardson*, 384 U.S. at 92).[9] *See also Connor v. Finch*, 431 U.S. 407, 415 (1977) (federal courts possess no distinctive mandate to compromise conflicting reapportionment policies).

Moreover, there is always a danger that a court may seem an unwitting ally of plaintiffs seeking to accomplish partisan political objectives. As Justice White stated in *Gaffney v. Cummings:*

> [T]he goal of fair and effective representation [is not] furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan *or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan. . . . We doubt that the Fourteenth Amendment requires repeated displacement of otherwise appropriate state decisionmaking.*
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> . . .

412 U.S. at 749 (emphasis added).

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the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.

Id.

[9] The Court expanded upon this point in *Gaffney*, reasoning:

> It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.

412 U.S. at 753.

A related and equally serious risk is that a court may bring confusion to the election process by intervening in a state's reapportionment efforts too close to upcoming elections. Clearly, prior decisions of the Court have approved lower court decisions to defer reapportionment orders until after imminent elections, even when this meant conducting elections with malapportioned districts. *Reynolds v. Sims,*[10] 377 U.S. at 586; *Davis v. Mann,* 377 U.S. at 684; *Lucas v. Forty-Fourth General Assembly of Colorado,* 377 U.S. 713, 738 (1964).

The federal district court in this case, however, imposed its deadline on the legislature and enjoined further elections under the prior district lines even though it conceded, in its opinion dated April 2, 1982, that there had been "no final failure to reapportion to date" and that "New York State still [had] time to act" (A-13). Nevertheless, it directed that New York devise and enact a reapportionment plan by April 16, 1982 — a scant two weeks away.

By basing its intervention on the mistaken belief that a new plan had to be in effect in time for the next election, rather than on whether the legislature had been given a reasonable opportunity to act, the court below greatly expanded its role in the reapportionment process, creating its own unprecedented rule of "instant unconstitutionality".[11] It held, in effect, that a

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[10] In *Reynolds,* for example, the Court said:

> We feel that the District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme.
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> . . .

377 U.S. at 586.

[11] The lower court's ruling was also based, in part, on a serious misreading of *Reynolds v. Sims,* 377 U.S. 533. In *Reynolds,* the Court, finding that the last reapportionment in Alabama had occured over sixty years earlier, held that a state must have "a reasonably conceived plan for periodic readjustment of legislative representation". 377 U.S. at 583. While the Court specifically stated that it did

federal court can impose its own plan whenever an election is upcoming and the legislature has not yet acted. Such a rule is a major departure from prior decisions of this Court. If allowed to stand, it will result in a vast increase in federal intervention in state legislative elections. In large states like New York, where reapportionment invariably involves complex technical, legal and political requirements, such a *per se* rule, which does not give adequate consideration to the time the legislature reasonably requires to devise and enact a reapportionment plan, would virtually assure federal intervention after every decennial census. Such judicial intrusion in the legislative process is premature, unwarranted and totally inconsistent with prior rulings by this Court.

As this Court stated in a prior reapportionment action, "[t]his very case represents what should not happen in the federal courts." *Gaffney v. Cummings*, 412 U.S. at 750. Prior to the district court's order of March 26, 1982, reapportionment pursuant to the 1980 census data was a matter of New York State legislative discussion and negotiation. *Cf., id.* at 749. It was being considered by New York's duly elected representatives and by demographic specialists appointed by them, and was proceeding within the decennial reapportionment requirements of the New York State Constitution, Article 3, Section

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"not intend to indicate that decennial reappportionment [was] a constitutional requisite", it noted that compliance with such an approach would clearly satisfy the constitutional requirement of "periodic readjustment". *Id.* at 583-84. Any lesser frequency of reapportionment, the Court added, would be "constitutionally suspect". *Id.* at 584.

The court below erroneously construed *Reynolds* as establishing a strict ten year time limit on any apportionment and districting plan. Thus, noting that the New York legislature had last been fully reapportioned in 1972, the lower court held that a failure by New York to reapportion by the end of 1982 would be unconstitutional A-18-19).

Plainly, *Reynolds* did not establish such a strict deadline as the lower court imposed, but simply required "periodic readjustment". *Id.* at 583. This was precisely what New York was already doing, based on decennial census data, without any need for the federal court's intervention.

4.[12] Discussion and negotiation of conflicting political interests were occurring, and there was no reason to assume that a mutually acceptable reapportionment plan would not have emerged in a "timely fashion". *Reynolds v. Sims*, 377 U.S. at 586.

By intervening as it did, however, the district court altered this process, imposing its own deadlines and pressure in addition to those of the normal political process. Although conceding that no constitutional violation had yet occurred (A-13), it ordered the legislature to meet the court's artificial deadline and enjoined further elections under the only legislative district lines then in existence. The court also appeared to give a partisan victory to the Democratic leaders of the legislature, who were aligned as plaintiffs in the litigation, although they obviously bore equal responsibility for any failure by the legislature to act.

Most egregious, however, was the court's failure to take into account, in setting its deadline, the need for a "reasonable opportunity" to assure that the census data were purged of errors, and that the many technical and legal requirements for a reapportionment plan were satisfied. That this result was harmful is reflected, in part, by the fact that the reapportionment plan passed by the legislature under the court's heavy pressure (1982 Laws, Chapters 111, 112) has had to be supplemented and corrected in a series of later bills (Chapters 113, 114, 115 and 130) designed to correct technical and other problems with the legislative plan. In addition, a number of lawsuits have been filed in New York State courts to date challenging the reapportionment plan for, *inter alia*, failing to comply with state constitutional and other requirements.[13]

In short, the profoundly harmful impact of the district court's premature intervention into New York's "primary

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[12] In its opinion, dated April 2, 1982, the district court apparently misconstrued appellants' position to be that the legislature had until 1986 to develop a new plan (A-17). Appellants' position is simply that the legislature must have a *reasonable opportunity* to develop a plan.

[13] *See* discussion note 15, *infra*.

jurisdiction" in this case proves the wisdom of this Court's often-repeated mandate that "[i]n fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'" *White v. Weiser, 412 U.S. at 795 (quoting Whitcomb v. Chavis,* 403 U.S. at 160). This Court should assume jurisdiction of this case to make it clear that the *per se* injunction entered by the district court in this case was unwarranted and that such judicial intervention is appropriate only after there has been a reasonable opportunity for the legislature to act.

II. The Lower Court Did Not Provide The Legislature With A Reasonable Opportunity To Act In Light of the Complex Technical, Legal And Political Issues Of Reapportionment.

This Court has recognized that reapportionment is a complex technical and political process. *Gaffney v. Cummings,* 412 U.S. at 753-54. In addition to the powerful constitutional policies requiring equal population distribution and fair treatment of minorities, a reapportionment plan must also take into account factors such as "the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts [and] the recognition of natural or historic boundary lines", particularly when the state constitution requires such consideration. *Swann v. Adams,* 385 U.S. 440, 444 (1967) (*relying upon Reynolds v. Sims,* 377 U.S. at 579). *See Mahan v. Howell,* 410 U.S. at 325 (preserving integrity of political subdivisions is rational state objective). Moreover, this Court has also recognized that reapportionment is a political matter that will involve negotiation and compromise by representatives of the major parties. *See, e.g., Gaffney v. Cummings,* 412 U.S. at 753.

Accordingly, in determining whether a "reasonable opportunity" has been provided to the legislature to enact a new plan, all of these factors must be considered if the time allotted is to be "reasonable" or "adequate" as required by this Court's prior decisions. Not only did the lower court fail even

to consider these factors, but the time period effectively imposed by the court, approximately seven months from receipt of the census data in usable form, was not enough time to constitute such a "reasonable opportunity".

Appellants, in the court below, described in detail the numerous difficulties involved in fashioning a reapportionment plan. *See* Affidavits of John F. Haggerty and Richard S. Scolaro reprinted (without exhibits) at pages A-31 and A-34, respectively. First, there were the technical problems of obtaining a reliable data base that accurately set forth the new population figures for each district. The 1980 census data, on which the New York reapportionment plan must be based, was not transmitted to the State of New York by the Census Bureau in usable form until September 1981. The statistics provided by the Census Bureau contained numerous errors, however, and the accuracy of this data continued to be checked and corrected at least until April 9, 1982 (A-35). Moreover, serious legal questions as to the adequacy and sufficiency of this data were raised that were not finally determined until March, 1982. *Carey v. Baldridge,* 50 U.S.L.W. 3716 (Mar. 9, 1982) (No. 81-752).[14]

A reapportionment plan in New York must also meet stringent state constitutional requirements. The New York Constitution, Article 3, Sections 4 and 5, sets forth, among others, the following rules governing senatorial districts:

> (a) Each district shall consist of contiguous territory.
>
> (b) No town, except a town having more than a full ratio of inhabitants, and no city block enclosed by streets or public ways shall be divided in the formation of Senatorial districts.

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[14] On December 22, 1980 the district court ordered adjustments in the 1980 census data. *Carey v. Klutznick,* 508 F. Supp. 420 (S.D.N.Y. 1980). In June, 1981 the Second Circuit Court of Appeals reversed that decision, *Carey v. Klutznick,* 653 F.2d 732 (2d Cir. 1981), and it was not until March, 1982 that this Court finally disposed of the matter, *cert. denied sub nom. Carey v. Baldrige,* 50 U.S.L.W. 3716 (Mar. 9, 1982) (No. 81-752).

(c) No Senatorial district shall contain a greater excess of population over an adjoining district in the same county than the population of a town or block therein adjoining such district.

(d) Each Senatorial district shall contain as nearly as may be an equal number of inhabitants.

(e) Each Senatorial district shall be in as compact form as practicable.

(f) Counties, towns or blocks which, from their location may be included in either of two districts, shall be placed to equalize the number of inhabitants in the two districts.

The rules governing assembly districts include the following:

(a) Each Assembly district shall consist of contiguous territory.

(b) No town, except a town having more than one and one-half ratios of population, and no city block enclosed by public ways shall be divided in the formation of Assembly districts.

(c) No Assembly district shall contain a greater excess of population over an adjoining Assembly district in the same county than the population of a town or block therein adjoining such Assembly district.

(e) Each Assembly district in the same county shall contain as nearly as may be an equal number of inhabitants.

(f) Each Assembly district shall consist of convenient territory.

(g) Each Assembly district shall be in as compact form as practicable.

See Interim Report of the Joint Legislative Committee on Reapportionment 12-13 (December 14, 1971). Obviously, devel-

oping any plan that meets all these demanding criteria takes a substantial amount of time.[15]

Aside from these technical and constitutional difficulties, any legislative reapportionment plan must also confront the fact that the upper house of the New York legislature is controlled by the Republicans and the lower house by the Democrats. Although all legislative parties recognize their obligation to reapportion expeditiously, the very nature of the legislative process and political party system demands time for negotiation and compromise, and this is especially true when one party does not control both houses of the legislature. Moreover, any changes or compromises made by the legislature require further work by the technical experts to ensure that such changes are properly made and do not require further adjustments in other districts. The Governor is then entitled to pass on any agreed upon plan. Finally, time must be allowed for Justice Department clearance under the Voting Rights Act.[16]

In short, the district court's order entirely failed to provide the "reasonable opportunity" required by this Court before judicial intervention was appropriate. Seven months simply

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[15] The state court actions filed recently challenge the constitutionality of the legislature's hastily devised plans. In *Bay Ridge Community Council, Inc. v. Carey*, Index No. 10984/82 (Kings Co., complaint dated May 26, 1982), plaintiffs allege that the redistricting plan for certain areas of Brooklyn "flagrantly ignores" the constitutional mandates of convenience, compactness and contiguity. For example, plaintiffs cite to one newly formed district that consists of two parts, each in a different community, and separated by two other districts. Similar allegations were made in *In re Whelan*, Index No. 12124/82 (Kings Co., petition dated June 9, 1982). In *In re LeBlanc*, Index No. 2151/82 (Schenectady Co., petition dated June 6, 1982), the plaintiff alleges, *inter alia*, that the plan divides twelve minor counties without regard to traditional districting patterns, and splits Fulton and Hamilton counties, all in direct violation of Article 3, Section 5 of the New York Constitution. These allegations obviously support the view that the district court below erred in disregarding the need for time to resolve such problems.

[16] The legislature's reapportionment plan was promptly submitted to the Department of Justice for its approval. To date, however, no decision has been announced.

was not sufficient time for the legislature to overcome the complex technical, legal and political problems involved in the reapportionment of New York State legislative districts.

The Supreme Court has shown a long and recurring interest in cases involving legislative and Congressional reapportionment. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962) (challenge to existing state reapportionment scheme is justiciable controversy). It is evident that the voting franchise is of profound national importance. Indeed, "the achieving of fair and effective representation for all citizens is . . . the basic aim of legislative apportionment". *Reynolds v. Sims*, 533 U.S. at 565-66. Thus, the Court has often exercised its jurisdiction to settle reapportionment controversies which threatened this "vital and worthy goal", and not always by requiring further reapportionment. *See, e.g., Gaffney v. Cummings*, 412 U.S. at 748, 752 (minor deviations from mathematical equality do not make out prima facie case of invidious discrimination, and "political fairness principle" is rational state policy justifying such deviations).

Although this Court has often stated that federal judicial intervention is not warranted until there has been a "reasonable" or "adequate" opportunity for the legislature to reapportion, we believe this is the first case that presents squarely the issue of what factors should be considered in determining whether a "reasonable opportunity" has been provided. As such, it is of profound significance to judges and legislators who will be faced with this problem after every decennial census, and is appropriate for plenary consideration by this Court.

CONCLUSION

For all the foregoing reasons, appellants respectfully request that the Court note probable jurisdiction and set this case down for a hearing at the earliest possible date.

June 22, 1982

Respectfully submitted,

s/

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN FLATEAU, et al.,

Plaintiffs,

—against—

WARREN M. ANDERSON, et al.,

Defendants.

82 Civ. 876

ORDER

LAWRENCE W. PIERCE, Circuit Judge
ROBERT J. WARD, District Judge
VINCENT L. BRODERICK, District Judge

Plaintiffs Flateau, *et al.*, filed this lawsuit on February 10, 1982, alleging, *inter alia*, that the present districting lines for the New York State Senate, Assembly and United States congressional districts are malapportioned in violation of the one person, one vote principle and, therefore, are unconstitutional. Defendants Anderson, *et al.*, various state officials, contest these allegations and both sides have moved for summary judgment.

By order of February 24, 1982, a three judge panel was convened pursuant to Title 28, U.S.C. §2284. Oral argument was had on the motions for summary judgment on March 26, 1982, and having heard all parties to this litigation, the court makes the following determinations. A written opinion will follow.

1. The present districting lines for the New York State Senate, Assembly, and United States Congressional districts may not, consistent with the equal protection clause of the Fourteenth Amendment and Article I, §2 of the Constitution, be employed to conduct any election for terms commencing on or after January 1, 1983 in any of these three bodies.

2. New York State is ordered to devise and enact a constitutional reapportionment plan for the State Senate, As-

sembly and United States Congressional districts by April 16, 1982. The parties will report to this court with respect to this matter at a further hearing to be held on April 19, 1982 at 2:00 p.m. in Room 1106.

3. Special elections have already been scheduled for April 20, 1982 to fill vacancies in the Legislature. Elections intended to fill such vacancies with respect to terms that expire on or before December 31, 1982 are not affected by this order.

4. James L. Emery, minority leader of the Assembly, has moved for leave to intervene as party defendant. The motion is granted on the condition that Mr. Emery subscribe to the Stipulation of Facts, and join in the motion for summary judgment made on behalf of defendants.

5. Defendant Lt. Governor Mario Cuomo's motion to dismiss the complaint is held in abeyance.

6. The American Civil Liberties Union's motion for leave to file an amicus curiae brief is granted.

The motions for summary judgment are disposed of in accordance with this order. We retain jurisdiction pending a final resolution of all the issues posed by this lawsuit.

SO ORDERED.

Dated: New York, New York
March 26, 1982

s/
Lawrence W. Pierce, Circuit Judge

s/
Robert J. Ward, U.S.D.J.

s/
Vincent L. Broderick, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN FLATEAU, ROBERT V. CONNELLY, AUDREY BYNOE and ANGEL A. RODRIGUEZ, and all persons similarly situated,

Plaintiffs,

82 Civ. 876

—and—

STANLEY FINK, both individually and as Speaker of the Assembly of the State of New York,

Plaintiff,

—and—

PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., et al.,

OPINION

Plaintiff-Intervenor,

—and—

MANFRED OHRENSTEIN,

Plaintiff-Intervenor,

—against—

WARREN M. ANDERSON, both individually and as Temporary President and Majority Leader of the New York State Senate; JAY P. ROLISON, JR., both individually and as Co-chairman of the Legislative Task Force on Reapportionment; THE SENATE OF THE STATE OF NEW YORK; MELVIN MILLER, both individ-

ually and as Co-chairman of the Legislative Task Force on Reapportionment; THE ASSEMBLY OF THE STATE OF NEW YORK; HUGH L. CAREY, both individually and as the Governor of the State of New York; MARIO M. CUOMO, both individually and as Lieutenant Governor of the State of New York and as Presiding Officer and President of the Senate of the State of New York; THE LEGISLATIVE ADVISORY TASK FORCE and THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK,

Defendants,

—and—

JAMES L. EMERY,

Defendant-Intervenor.

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New York Civil Liberties Union
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As amicus curiae
By: Arthur Eisenberg, Esq. and Richard Emery, Esq.

United States Department of Justice
Civil Rights Unit
United States Attorney's Office, S.D.N.Y.
As amicus curiae
By: William J. Hibsher, Esq.

Before: Honorable Lawrence W. Pierce,
Circuit Judge
Honorable Robert J. Ward, District Judge
Honorable Vincent L. Broderick,
District Judge.

Per Curiam

I.

This lawsuit challenges the constitutionality of the present apportionment scheme of the New York State Senate, Assembly and congressional districts. Plaintiffs are four New York State voters, the Speaker of the State Assembly, the Minority Leader of the State Senate, and the Puerto Rican Legal Defense and Education Fund, Inc. Defendants are the Majority Leader of the State Senate, the Senate itself, the Minority Leader of the State Assembly, the Assembly, the Governor, the Lieutenant Governor, the State Board of Elections, and the

Legislative Advisory Task Force on Reapportionment and its two co-chairmen.[1]

The complaint was filed on February 10, 1982. Pursuant to 28 U.S.C. §2284, a three-judge court was convened. The court heard argument on various motions, including motions for summary judgment, on March 26, 1982.

All plaintiffs essentially argue that based on the 1980 New York decennial census data, which show a shift and decrease in total population, the existing apportionment schemes for New York's legislative and congressional districts, drawn pursuant to the 1970 census, violate, respectively, the "one-person, one-vote" principle enunciated under the Equal Protection Clause, *Reynolds v. Sims*, 377 U.S. 533 (1964), and Article 1, §2 of the United States Constitution. Some plaintiffs also urge that due to an increase in minority population the existing apportionment scheme for the state legislative violates the Fifteenth Amendment to the United States Constitution and the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973, *et seq.* (1981). All the plaintiffs urge that the present apportionment schemes be declared unconstitutional.

All but one plaintiff request the court to order New York State to enact a constitutional plan of reapportionment by April 16, 1982 and failing that, request that this court devise a reapportionment plan. The Puerto Rican Legal Defense and Education Fund, Inc. requests that the court itself immediately redistrict the State.

Certain of the defendants (the State Senate, Warren M. Anderson individually and as Majority Leader of the Senate, and Jay P. Rolison, Jr. individually and as co-chairman of the

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[1] The original plaintiffs were voters John Flateau, Robert V. Connelly, Audrey Bynoe and Angel A. Rodriguez. Stanley Fink, Speaker of the Assembly, was originally named as a defendant; with the consent of all parties he was realigned as a plaintiff. The Puerto Rican Legal Defense and Education Fund, Inc. and Manfred Ohrenstein, the Minority Leader of the State Senate, were permitted to intervene as plaintiffs. James L. Emery, Minority Leader of the State Assembly, was permitted to intervene as defendant.

Legislative Advisory Task Force on Reapportionment) agree that a reapportionment plan must be enacted now with respect to New York's congressional districts but dispute the need to reapportion immediately with respect to the state legislative districts. They argue that Article 3, §4 of the New York State constitution allows up to six years for the creation of a reapportionment plan for State Senate and Assembly districts.[2]

Governor Carey, another defendant, agrees with plaintiffs that the state should be required to prepare redistricting plans for congressional, Senate and Assembly districts by a date to be fixed by the court, but cautions against any finding of unconstitutionality which would affect either the power of the legislature to act as presently constituted, or the propriety of filling existing legislative vacancies by special elections prior to redistricting. All defendants urge that there should be no finding that the present district lines violate either the Voting Rights Act of 1965 or the Fifteenth Amendment.

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[2] The relevant part of Article 3, §4, of the State constitution provides:

> Except as herein otherwise provided, the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor. . . . At the regular session in the year nineteen hundred thirty-two, and at the first regular session after the year nineteen hundred forty and after each tenth year therefrom the senate districts shall be readjusted or altered, but if, in any decade, counting from and including that which begins with the year nineteen hundred thirty-one, such a readjustment or alteration is not made at the time above prescribed, it shall be made at a subsequent session occurring not later than the sixth year of such decade, meaning not later than nineteen hundred thirty-six, nineteen hundred forty-six, nineteen hundred fifty-six, and so on; provided, however, that if such districts shall have been readjusted or altered by law in either of the years nineteen hundred thirty or nineteen hundred thirty-one, they shall remain unaltered until the first regular session after the year nineteen hundred forty.

At the conclusion of the arguments on March 26, 1982, we disposed of the pending motions for summary judgment by issuing an order 1) which held that the present New York congressional, Senate and Assembly districts may not, consistent with the Equal Protection Clause of the Fourteenth Amendment and Article 1, §2 of the Constitution, be employed to conduct any elections for terms commencing on or after January 1, 1983; 2) which directed New York State to devise and enact a constitutional reapportionment plan for Senate, Assembly and congressional districts by April 16, 1982; 3) which specified that special elections intended to fill vacancies in the present state legislature were not affected by the order; and 4) which retained jurisdiction in this court pending final resolution of all issues raised in this action. This opinion sets forth the bases upon which that order was issued.

II.

There is no dispute with respect to the following:[3]

In 1972, the New York State Legislature with the approval of the Governor enacted congressional and State Senate and Assembly reapportionment and redistricting plans for the 1972 statewide primary and general elections.[4]

On January 10, 1974 the United States District Court for the District of Columbia entered an order subjecting the counties of Kings, New York and Bronx to the provisions of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973, *et seq.*, thus requiring compliance, as to those counties, with the pre-

[3] The parties executed and filed a stipulation from which the statement of facts in this opinion is derived.

[4] The Assembly and Senate are the legislative bodies of the State of New York. The Assembly presently consists of 147 duly elected members, with 3 vacancies, from 150 districts throughout New York State; the Senate consists of 58 duly elected members, with 2 vacancies, from 60 districts throughout New York State. The Senate and Assembly are required by Article 3, §4 of the New York State constitution to act as co-equal participants in altering and adjusting congressional, Senate and Assembly district lines after each federal decennial census.

clearance requirements of Section 5, 42 U.S.C. §1973c.[5] To effect such compliance, New York State in 1974 amended the 1972 reapportionment and redistricting plans by altering 16 out of 150 Assembly districts, 8 out of 60 Senate districts, and 4 out of 39 congressional districts. 1974 New York Laws, c.588, c. 589.

Since 1974 no new reapportionment or redistricting has taken place.

On December 31, 1980 the United States Census Bureau officially certified to the President of the United States the total population of New York State as 17,557,288. As a result of the decrease in New York's population as evidenced by the census, New York State has lost 5 congressional seats, from 39 to 34. The population mean of each congressional district will be 516,391 persons.[6] Based on a presently existing State Senate of

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[5] Section 5, 42 U.S.C. §1973c, deals with, *inter alia*, the alteration of voting qualifications and procedures. Section 5 provides in pertinent part:

> [W]henever a State of political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure . . .

[6] If New York's 1980 census population of 17,557,288 were distributed among the 39 existing congressional seats, the population mean would be 450,187 and not 516,391.

60 members, the population mean of each senatorial district under the 1980 census will be 292,621 persons. The population mean of each of the 150 Assembly districts will be 117,048 persons.

Based on the above figures, the maximum positive and negative percentage deviations from the population means for the State Senate and Assembly districts as presently constituted are as follows:[7]

District	Percentage Deviation from Population Mean	Maximum Percentage Deviation
Senate #1	48.91	
Senate #32	–35.84	84.75
Assembly #1	51.91	
Assembly #79	–57.09	109.00

It has been conceded that if a legislative reapportionment plan for the State Assembly and Senate were enacted today which contained such deviations from the population means, it would violate the Equal Protection Clause of the Fourteenth Amendment.[8] *See* Stipulation 15 of Stipulation of Facts.

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[7] An accepted measure in considering the constitutionality of apportionment plans is that of maximum percentage deviation from the population mean. Such a formula for determining the constitutionality of apportionment plans was approved by the Supreme Court in *Abate* v. *Mundt*, 403 U.S. 182 (1971). The maximum percentage deviation is determined by adding the percentage deviation above the population mean of the district with the greatest number of voters to the percentage deviation below the population mean of the district with the fewest number of voters. This formula can presently be applied with respect to the State Senate and Assembly districts, since the 1980 census figures will be applied to the same number of districts. It does not lend itself to the congressional district situation, since there has been a change (from 39 to 34) in the number of districts.

[8] The census figures show substantial increases in the population of racial minorities in the State of New York, particularly in Bronx and Kings Counties. We have not deemed it necessary to this point, in deciding the issues before us, to consider dilution problems. We assume that in developing appropriate reapportionment plans New York State will give consideration to such matters.

The New York State Legislature has been convened in regular session since January 6, 1982, and has not passed a new apportionment plan based on the 1980 decennial census.[9]

The following is a partial calendar of significant dates in the New York State 1982 electoral process:

State Committee meetings to designate statewide candidates	June 15-22
First day to sign designating petitions for primary election	June 22
Dates for filing designating petitions	July 26-29
Primary Election	September 14
General Election	November 2

Any redistricting plan enacted by New York State reapportioning New York congressional, Senate and Assembly districts will have to be enacted pursuant to the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973, *et seq.* and precleared pursuant to Section 5 of the Act, 42 U.S.C. §1973c.[10]

There are no genuine issues of material fact with respect to the foregoing. We turn, therefore, to the issues of law.

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[9] Both houses of the legislature have released separate proposed reapportionment plans for the State Senate and State Assembly districts and the Senate has passed Bill #8534 for statewide congressional redistricting

[10] Because Bronx, New York, and Kings Counties fall under §5 of the Voting Rights Act, before any reapportionment plan enacted by the legislature and signed by the Governor may be implemented, it must be submitted to the United States Attorney General for preclearance, or else a declaratory judgment approving the plan must be obtained from the United States District Court for the District of Columbia. 42 U.S.C. §1973c. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 157 (1977). If the plan is submitted to the Attorney General (the usual method used by covered jurisdictions), he has 60 days to file an objection or to request additional information. If no objections or requests for information are made within 60 days the plan becomes law. If an objection or request is made, the sixty day period commences again when a satisfactory response is received. *Georgia* v. *United States*, 411 U.S. 526, 539 (1973); 28 C.F.R. §51.3(b)-(d). Thus a plan does not necessarily become law after the 60 days elapse.

III.

We consider preliminarily whether the issues presented in this action are ripe for judicial intervention. Is there a case or controversy? While plaintiffs attack New York State's failure to reapportion in the wake of the 1980 decennial census, the state legislature is in session and presumably will remain in session, and it still has time to act.

All state parties, whether aligned as plaintiffs or defendants, recognize their constitutional and statutory obligation to reapportion New York's congressional districts, and this court's direction with respect to those districts was consented to by defendants.

As to State Senate and Assembly districts, some of the defendants forcefully maintain that the state is not constitutionally required to effect reapportionment this year. Of course, the concurrence of these defendants — the State Senate itself and the Majority Leader of the Senate — is necessary for enactment of any reapportionment plan. Absent intervention by this court, New York will not reapportion its Senate and Assembly districts this year unless there is a speedy change of position by these defendants. While there has been no final failure to reapportion to date, the inevitability of such failure if this court does not direct reapportionment has persuaded us that the matter is ripe for adjudication. Since New York State still has time to act, no constitutional violation has yet occurred. It is nevertheless entirely appropriate for us to conclude, as we have, that unless we direct that reapportionment of State Senate and Assembly districts take place this year it will not take place, and that such a failure would be constitutionally unacceptable. If we waited until there no longer was time in 1982 for the reapportionment to be effected, the constitutional violation would then have occurred, but it would be too late for any timely remedy to be structured. *Cf. Watson* v. *Commissioners Court of Harrison County,* 616 F.2d 105, 107 (5th Cir. 1980).

IV.

The present New York statute with respect to congressional redistricting (Laws of 1972, Chs. 76, 77 and 78 as amended by Ch. 589 of the Laws of 1974), which provides for 39 congressional districts, cannot serve as the basis for the 1982 election of 34 representatives. An election held under the present congressional districting plan would therefore violate Article 1, §2 of the United States Constitution.[11]

All parties have agreed that a new apportionment plan must be enacted for the 1982 congressional election.

V.

Plaintiffs urge that immediate reapportionment of New York's Senate and Assembly districts, based on the data derived from the 1980 decennial census, is constitutionally compelled. Certain of the defendants[12] maintain that since there are in place carefully structured New York constitutional

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[11] Article 1, §2, Clause 3 provides:

> Apportionment of representatives and taxes
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall be Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[12] The Senate, the Senate Majority Leader, and the co-chairman of the Legislative Advisory Task Force on Reapportionment.

provisions with respect to reapportionment, New York need not reapportion its Senate and Assembly districts this year so long as it does reapportion in due course in accordance with the state constitutional provisions. These provisions would permit New York to delay Senate and Assembly reapportionment until 1986.

The New York constitution does set rigorous requirements with respect to apportionment. N.Y. Const. Art. 3, §§4 and 5. Apportionment by the legislature is subject to review by the New York courts. It is also, as a practical matter, subject to preclearance by the Attorney General of the United States or the District Court of the District of Columbia pursuant to 42 U.S.C. §1973c. *See* fn. 10, *supra.*

Thus these defendants present squarely to this court the issue of whether state legislative elections may be held where the legislative districts are concededly malapportioned, if the state concerned has a constitutional provision which in time will require a correction of the malapportionment. The specific question in terms of New York State is whether it would be constitutionally permissible, in the face of existing maximum percentage deviations from the mean of 84.75% for the Senate and 109% for the Assembly, to hold elections this year (and perhaps also in 1983, 1984, and 1985) on the basis of district lines which were last drawn in 1972 based on 1970 census data.

One of the fundamental Constitutional rights underlying the American system of representative government is the right of a citizen to participate in an election on an equal basis with every other citizen. *Dunn* v. *Blumstein,* 405 U.S. 330, 336 (1972); *Seamon* v. *Upham,* Civ. No. P-81-49-CA (E.D. Tex. Feb. 27, 1982) (Justice, J., concurring and dissenting). Any alleged infringement of the right to vote requires close scrutiny:

> Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Reynolds v. *Sims, supra,* 377 U.S. at 562.

The guiding constitutional principle, with respect to state legislative apportionment plans, is that "the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Id.* at 568. A reapportionment plan must contain "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579.

"Substantial equality" does not mean that each district must have an "identical number of residents, or citizens, or voters" because "[m]athematical exactness or precision is hardly a workable constitutional requirement." *Id.* at 577. Districts must, however, be "as nearly of equal population as is practicable." *Id. See also Gaffney* v. *Cummings,* 412 U.S. 735, 743-44 (1973).

Deviations from population equality of under ten percent have been held to be "minor" with respect to state legislative districts, and they do not constitute *per se* violations of equal protection. *Gaffney v. Cummings, supra; Marshall* v. *Edwards,* 582 F.2d 927, 934 (5th Cir. 1978), *cert. denied,* 101 S.Ct. 3080 (1981). Deviations which are more than "minor" must be based on "legitimate considerations incident to the effectuation of a rational state policy" to be constitutionally permissible. *Reynolds* v. *Sims, supra,* 377 U.S. at 579. *See also Mahan* v. *Howell,* 410 U.S. 315, 325 (1973).[13]

In *Mahan, supra,* the policy of maintaining the integrity of political subdivision lines was held to justify a maximum

[13] Congressional reapportionment is subject to a more stringent constitutional standard than state legislative reapportionment. *Gaffney* v. *Cummings, supra,* 412 U.S. at 741-42; *Mahan* v. *Howell, supra,* 410 U.S. at 322. Therefore, greater population deviations are permitted when a state reapportions its state legislature than when it reapportions its congressional districts. *Gaffney* v. *Cummings, supra; Mahan* v. *Howell, supra.*

percentage deviation from the population mean of 16.4%. 410 U.S. at 329.[14] The same policy was held to justify a maximum deviation of 11.9% in *Abate* v. *Mundt*, 403 U.S. 182, 185 (1971).

Reynolds v. *Sims*, *supra*, suggests a toleration of otherwise unjustifiable malapportionment if the state can demonstrate that it has adopted, and is in compliance with, "a reasonably conceived plan for periodic readjustment of legislative representation." 377 U.S. at 583. The mere fact that there is significant malapportionment at any given time does not necessarily give rise to a constitutional violation if the state shows that it has enacted a plan pursuant to "a rational approach to readjustment of legislative representation in order to take into account population shifts and growths." *Id.*

However, despite some tolerance for deviations in cases where a "rational state policy" will otherwise be furthered, some deviations are so substantial that no state interests or policy can justify them. *Gaffney* v. *Cummings*, *supra*, 412 U.S. at 744.[15] If present New York Senate and Assembly district lines were used, the maximum percentage deviations would be 84.75% and 109%, respectively. Deviations of such a magnitude, if presently enacted, would constitute *per se* violations of the equal protection principle of "one person, one vote."

Defendants argue that Article 3, §4 of New York State's constitution evidences a "reasonably conceived plan for periodic readjustment of legislative representation." This provision mandates reapportionment to be made each decade, at some time prior to the conclusion of the sixth year of the decade. Since it is only 1982, defendants insist that there will be a constitutional violation only if a Senate and Assembly reapportionment plan has not been enacted prior to December 31, 1986.

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[14] The average percentage deviation in *Mahan* was +/— 3.89%. Out of 52 districts, 35% were within 4% of the ideal and 9 exceeded a 6% variation from the ideal. 410 U.S. at 319.

[15] *See also Swann* v. *Adams*, 385 U.S. 440 (1967) (a 25.65% deviation held invalid); *Kilgarlin* v. *Hill*, 386 U.S. 120, 122-123 (1967) (a 26.48% deviation viewed with suspicion but not ruled on).

The issue, then, becomes whether the state constitution provides "a rational approach to readjustment of legislative representation in order to take into account population shifts and growths." *Reynolds* v. *Sims, supra,* 377 U.S. at 583.

The *Reynolds* Court held that "if reapportionment were accomplished [pursuant to a state reapportionment provision] with less [than decennial] frequency, it would assuredly be constitutionally suspect." *Id.* at 584. Since the last reapportionment in New York occurred in 1972,[16] a failure to reapportion the current districting lines for the state legislature with respect to terms commencing on or after January 1, 1983 would render New York's present apportionment scheme more than ten years old and hence "constitutionally suspect."[17] To determine whether this scheme would be "constitutionally infirm" as well, we must balance the state's interest in delaying reapportionment until after the 1982 general elections against the interests of the thousands of New York voters whose voting strength in the 1982 general election stands to be diluted, relative to the voting strength of citizens living in other parts of New York State, if such a delay in reapportionment occurs. In assessing the interests of the voters we must consider the extent of the dilution.

The state certainly has interests in sovereignty and self-government and "the need for stability and continuity in the organization of the legislative system." *Reynolds* v. *Sims, supra,* 377 U.S. at 583. Apportionment is a political and legislative process with respect to which judicial caution is indicated. Defendants have, however, presented no strong or convincing

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[16] *See* p. 7, *supra.* The legislative reapportionment predicated on the 1970 census was enacted in 1972. The 1974 amendments, necessitated by the application of the Voting Rights Act, affected only 8 Senate districts, 16 Assembly districts, and 4 congressional districts.

[17] Indeed, by allowing up to six years from the date of the last decennial census, Article 3, §4, of the New York State constitution affords the possibility that the interval between apportionment could be as great as fourteen years, *i.e.*, reapportionment, having last occurred in 1972, might be accomplished as late as December 1986 based on the 1980 census.

reasons why reapportionment should not be accomplished in time for the 1982 general elections. They do not assert that immediate reapportionment is impossible. They, instead, rely on tradition. They argue that reapportionment ought not be accomplished this year because "[t]he tradition of New York State has been that reapportionment had [sic] not occurred until after the first election in the decade and until the third year of the decade." Transcript of Argument, March 26, 1982, at 45.

We will assume that this "tradition" of third-year reapportionment in fact exists in New York State, although we note that it was not observed in the 1960's or the 1970's.[18] Such a tradition is of significance to our present analysis only if it is an expression of significant state interests or concerns. Defendants have, however, failed to suggest any reason for the advent of this tradition; more importantly, they have advanced no argument, other than the fact of its existence, for its continued observance. Under these circumstances, we decline to accord New York State's tradition of third-year reapportionment significant weight in striking the balance of interests described above.

The significance of the voters' interest in any given reapportionment case is primarily a function of the relative severity of the malapportionment. In New York we are faced with deviations as much as five times greater than the largest deviations that the Supreme Court has found to pass constitutional muster in newly enacted apportionment plans. Given these variations, and defendants' failure to present any compelling justification for delay, we conclude that the Equal Protection Clause of the Fourteenth Amendment, in conjunction with the Supremacy Clause of Article 6 of the United States Constitution, mandates immediate reapportionment. *Reynolds* v. *Sims, supra,* 377 U.S. at 583-584; *Goines* v.

[18] New York enacted a reapportionment plan based on the 1970 census in 1972. It did not enact a reapportionment plan based on the 1960 census until 1964, and did so at that time only after having been ordered to reapportion by the United States Supreme Court. *See WMCA, Inc.* v. *Lomenzo,* 377 U.S. 633 (1964).

Rockefeller, 338 F.Supp. 1189, 1195 (S.D. W.Va. 1972); *Bennett* v. *Elliott,* 294 F. Supp. 808, 810 (M.D. Tenn. 1968).[19]

VI.

The United States Supreme Court has enunciated on numerous occasions that "legislative reapportionment is primarily a matter for legislative consideration and determination." *Reynolds* v. *Sims, supra,* 377 U.S. at 586; *Maryland Committee for Fair Representation* v. *Tawes,* 377 U.S. 656, 676 (1964); *Chapman* v. *Meier,* 420 U.S. 1, 27 (1975); *Connor* v. *Finch,* 431 U.S. 407, 414 (1977). Reapportionment is a "legislative task which the federal courts should make every effort not to preempt." *Wise* v. *Lipscomb,* 437 U.S. 535, 539 (1978), citing to *Connor* v. *Finch, supra,* 431 U.S. 407, 414-415. *See also Seamon* v. *Upham, supra* at 6. Therefore, when the court declares an existing apportionment plan unconstitutional, it is "appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise* v. *Lipscomb, supra,* 437 U.S. at 540. *See also Connor* v. *Finch, supra,* 431 U.S. at 414-415.

We believe that the April 16, 1982 deadline ordered by this court affords the legislature "a reasonable opportunity . . . to meet constitutional requirements . . ." *Wise* v. *Lipscomb, supra,* at 540. As the Supreme Court reasoned in *Reynolds* v. *Sims,* once a plan has been found unconstitutional, "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." 377 U.S. at 585.

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[19] As *Goines v. Rockefeller, supra,* stated in discussing the Supremacy Clause requirements: "In state legislative apportionments, the equal protection clause of the United States Constitution and the 'one man-one vote' principle developed therefrom, being a part of the supreme law of the land, will prevail over any inconsistent provisions of a state constitution". 338 F.Supp. at 1195.

The case before us is not the "unusual case" contemplated by *Reynolds* v. *Sims*. For example, a situation which "*might* justify a court in withholding the granting of immediately effective relief" is one "where an impending election is imminent and a State's election machinery is already in progress." *Id.* (emphasis added).

The machinery for the 1982 elections in New York State is not yet in full operation and the primary elections are six months in the future. Furthermore, the political process does not commence until June 22. *Cf. Wells* v. *Rockefeller*, 394 U.S. 542, 547 (1969) (where the primary election was only three months away, the court held that "we cannot say there was error in permitting the [1968] election to proceed under the plan despite its constitutional infirmities"); *Klahr* v. *Williams*, 313 F.Supp. 148, 152 (D. Ariz. 1970), *aff'd sub nom. Ely* v. *Klahr*, 403 U.S. 108 (1971) (the court allowed elections to be held under the old plan where nominating petitions had already been circulated and had to be filed within seven weeks of the court's decision); *Swann* v. *Adams*, 383 U.S. 210, 212 (1966) (the Supreme Court ordered a valid apportionment plan "be made effective for the 1966 elections").

Considering these circumstances, it is not unreasonable to insist that the legislature enact, and the Governor sign, a valid reapportionment statute in time for the 1982 elections to proceed as scheduled.

VII.

Plaintiffs have also contended that the present state legislative and congressional plans violate the 15th Amendment and the Voting Rights Act of 1965 as amended, 42 U.S.C. §1973, *et seq.* Since on the basis of the "one person, one vote" rule of *Reynolds* v. *Sims, supra,* and Article 1, §2, we have directed that reapportionment plans be devised and enacted, we need not reach plaintiffs' other claims.

As previously stated, *supra* at 6-7, an order in accordance with this opinion was filed on March 26, 1982.

s/
Lawrence W. Pierce, U.S.C.J.

s/
Robert J. Ward, U.S.D.J.

s/
Vincent L. Broderick, U.S.D.J.

Dated: New York, New York
April 2, 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN FLATEAU, et al.,

Plaintiffs,

82 Civ. 876

—v—

ORDER

WARREN M. ANDERSON, et al.,

Defendants.

LAWRENCE W. PIERCE, Circuit Judge
ROBERT J. WARD, District Judge
VINCENT L. BRODERICK, District Judge

By Order dated March 26, 1982, the Court ordered that the present districting lines for the New York State Senate, Assembly, and the United States Congressional districts may not, consistent with the Equal Protection Clause of the Fourteenth Amendment and Article I, §2 of the Constitution, be employed to conduct any election for terms commencing on or after January 1, 1983 in any of these three bodies. Accordingly, the Court ordered New York State to devise and enact a constitutional reapportionment plan for the State Senate, State Assembly, and the United States Congressional districts by April 16, 1982.

To date, the parties have failed, in violation of this Court's March 26 Order, to enact reapportionment plans for the State Senate, State Assembly, or United States Congressional districts. Having heard all the parties to this litigation, the Court rules as follows:

1. The motions of defendants Anderson, Rolison, and the New York State Senate and intervenor Emery for a partial stay of the Court's March 26, 1982 Order are denied on the merits.

2. Although the task of reapportionment is primarily a legislative function rather than a judicial function, the constitutional rights of the public must be protected. Consequently, the Court shall appoint a Special Master or Special Masters

with instructions to devise reapportionment plans for the State Senate, State Assembly, and United States Congressional districts in New York State. The proposed plans shall conform to federal and state constitutional requirements, as well as the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973 et seq. The Special Master(s) shall submit plans for the Court's approval on or before June 7, 1982. A further Order delineating the duties of the Special Master(s) shall follow.

3. Nothing contained in this Order shall be deemed to relieve the pertinent parties of their legislative and executive duties, and they are ordered to continue negotiations toward enactment of reapportionment plans for the State Senate, State Assembly, and United States Congressional districts.

4. In the event that New York State enacts any reapportionment plan prior to this Court's adoption of its *own* reapportionment plans, whatever plan is enacted shall be submitted to the Department of Justice for preclearance pursuant to 42 U.S.C. §1973c.

5. The parties shall report to the Court concerning their progress toward enacting legislative reapportionment plans on May 10, 1982 at 4:00 p.m. in Courtroom 519.

6. The Court shall not entertain any further applications for realignment or intervention.

SO ORDERED.

Dated: New York, New York
April 19, 1982

s/
Lawrence W. Pierce, U.S.C.J.

s/
Robert J. Ward, U.S.D.J.

s/
Vincent L. Broderick, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN FLATEAU, et al.,

Plaintiffs,

—against—

82 Civ. 876 (VLB)
ORDER

WARREN M. ANDERSON, et al.,

Defendants.

LAWRENCE W. PIERCE, Circuit Judge
ROBERT J. WARD, District Judge
VINCENT L. BRODERICK, District Judge

1. By Order dated April 19, 1982, the Court denied the motions of defendants Anderson, Rolison, and the New York State Senate and intervenor Emery for a partial stay of the Court's March 26, 1982 Order which had directed that New York State devise and enact constitutional reapportionment plans for the State Senate, State Assembly, and United States congressional districts by April 16, 1982.

2. To date the parties have failed, in violation of the Court's March 26, 1982 Order, to enact reapportionment plans for these districts. Confronted with this failure, and mindful of its own obligation to protect the constitutional rights of the public, the Court, pursuant to Rule 53(a), Fed.R.Civ.P., appoints Robert P. Patterson, Jr. as Special Master to develop constitutional reapportionment plans for the New York State Senate, State Assembly, and United States Congressional districts, and to report with respect thereto to the Court.

3. In performing his duties under this Order, the Special Master shall enjoy all the powers delineated in Rule 53, Fed.R.Civ.P., and shall be guided by the following:

a. The plans he develops shall be in compliance with the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973 *et seq.* and all federal constitutional requirements. These plans shall in addition be in compliance with New York State constitutional requirements, unless such com-

pliance is incompatible with federal constitutional or statutory requirements.

b. To the extent consistent with Paragraph 3a, the Special Master shall take cognizance of the following principles, drawn from federal case law, and New York statutory and constitutional law, in devising the reapportionment plans:

i) *Contiguity:* each district must consist of contiguous territory so that it is not necessary to go out of the district in order to travel from one part of the district to another.

ii) *Population Equality and Allowable Deviations therefrom:* absent any justification derived from other principles such as contiguity or compactness, each district shall be equal in population. Any justification being present, the deviation from the population mean shall be no greater than 5% for the State Senate and the State Assembly districts and 1% for the United States Congressional districts.

iii) *Minimization of the Division of the Counties, Towns and Cities:* districts shall be established with reference to permanent, pre-existing lines of political subdivisions as much as possible. If any county, town or city must be divided, more populous ones are to be divided before less populous ones, to the extent not inconsistent with Art. 3 §4 of the New York Constitution.

iv) *Separation of as Small a Population as Possible from the Main Body of a Political Subdivision:* if a county, town or city must be divided, as much of the population of a divided county, town or city as possible must be kept in districts wholly within that county, town or city.

v) *Compactness:* to the extent that it is consistent with the foregoing, the *total* length of the boundaries of all districts in New York State as a whole shall be as short as possible.

c. The Special Master shall be empowered to receive the following:

i) any proposed criteria not already enumerated in b), *supra*, to be utilized in drawing the district lines;

ii) any proposed reapportionment plans from any interested persons; and

iii) any comments in support or in opposition to the various plans which are submitted.

d. The Special Master shall have access to the data base and computer capability of the Legislative Advisory Task Force on Reapportionment. It, and all parties hereto, are directed to render every possible assistance to the Special Master in the performance of his duties.

e. The Special Master is empowered to hold hearings, and to regulate all proceedings in every hearing and to do all acts and take all measures necessary or proper for the efficient performance of his duties under this Order. He may also require the production of documents, maps, papers, and writings applicable and pertinent to the devisement of reapportionment plans. If any hearing or hearings shall be necessary, the Special Master shall proceed without delay to hold them.

f. The Special Master may appoint a staff and consult with professional experts to assist him. Such appointments shall be made in consultation with the Court.

g. The Special Master may apply to the Court for sanctions for noncompliance with his orders. If the parties fail to appear at a scheduled hearing, the Special Master may proceed ex parte or adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

h. The Special Master shall report to the Court on a weekly basis, either orally or in writing, apprising the Court of his progress.

4. The Special Master shall present to the Court at least one plan for each of the three legislative bodies (i.e., the State Senate, State Assembly, and United States Congress) on or

before Tuesday, June 1, 1982.[1] A written report shall accompany the plans. The parties to this action, and the amici curiae, shall have until Monday, June 7, 1982 to file whatever objections they may have to the plans presented. No objections shall be entertained after that date.

5. The Special Master shall be present at the next hearing of the Court, scheduled for Monday, May 10, 1982 at 4:00 p.m. in Room 110 of the United States Courthouse.

6. The Special Master shall keep accurate time records which reflect the time spent on his duties as Master. Upon the completion of his duties, he shall submit an application for reasonable fees and expenses which, upon approval by the Court, shall be taxed against the State of New York.

The Court reasserts that reapportionment is primarily a legislative function. It has only ordered the appointment of a Special Master because the responsible state elected officials have failed to act. Thus nothing in this Order shall be deemed to relieve the pertinent parties of their legislative and executive duties to devise and enact constitutionally valid reapportionment plans for the State Senate, State Assembly, and United States Congressional districts in New York State.

SO ORDERED.

Dated: New York, New York
April 23, 1982

s/
Lawrence W. Pierce, Circuit Judge

s/
Robert J. Ward, District Judge

s/
Vincent L. Broderick, District Judge

[1] This constitutes a modification of the requirements set forth in the order of April 19, 1982.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN FLATEAU, *et al.*,

Plaintiffs,

—against—

WARREN M. ANDERSON, *et al.*,

Defendants.

82 Civ. 0876 (VLB)
(Statutory Three-Judge Court)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that defendants Warren M. Anderson, Jay P. Rolison, Jr., James L. Emery and the New York State Senate, hereby appeal to the Supreme Court of the United States from this Court's order of March 26, 1982 insofar as that order mandates the state to "devise and enact a constitutional reapportionment plan for the State Senate [and] Assembly" prior to the end of the 1982 legislative session in December and enjoins the present State Senate and Assembly districting lines from being employed to conduct any election for terms commencing on or after January 1, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
April 23, 1982

By: s/
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Force on Reapportionment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN FLATEAU, *et al.*,

Plaintiffs,

—*against*—

WARREN M. ANDERSON, *et al.*,

Defendants.

82 Civ. 0876 (VLB)
(Statutory Three-Judge Court)

AFFIDAVIT

JOHN F. HAGGERTY, being duly sworn, deposes and says:

1. I am an attorney at law and submit this affidavit in support of the motion of defendants Anderson, Rolison and the New York State Senate for a limited stay of this Court's Order dated March 26, 1982:

(a) Extending the time under which the State is mandated to "devise and enact a constitutional reapportionment plan for the State Senate [and] Assembly" from April 16, 1982 to the end of the 1982 legislative session in December;

(b) Staying that portion of the Court's Order which enjoins the present State Senate and Assembly districting lines from being employed to conduct any election for terms commencing on or after January 1, 1983.

2. On March 26, this Court enjoined the present State Senate and Assembly districts from being used in the 1982 general elections and directed New York to enact a constitutional reapportionment plan by April 16, 1982.

3. The New York State Senate had already passed a reapportionment plan for the state's congressional districts on March 3, 1982. A plan to reapportion the legislature will be introduced into the Senate prior to April 19, 1982 and will be scheduled for a vote during the week of April 19.

4. Pursuant to the instructions of this Court, defendant Anderson and plaintiff Fink have met on four occasions in an

attempt to reach an agreement with respect to reapportionment of the congressional and state legislative districts. I have participated in each of these meetings. Although some progress has been made, there is no agreement as of this date.

5. In addition to these meetings between the legislative leaders, members of the staff and I have had numerous other conversations with plaintiff Fink's staff, representatives of the minority in both houses of the legislature and various congressmen and state legislators. Indeed, except for time spent on state budget matters, I have spent virtually all my time since March 26 dealing with reapportionment.

6. The development of a valid reapportionment plan is an immensely complicated task. First, there are enormous technical difficulties in producing a plan which complies with all state and federal requirements as to population, minority representation, compactness, contiguity, county lines, etc. (witness the fact that the plan produced by plaintiff Fink took until March 22, 1982 to be introduced, and it contained numerous errors). However, the political considerations may be even more difficult. To put together sufficient votes to pass a reapportionment plan in both houses of a politically divided legislature within three weeks — a time period which saw the passage of a $27 billion state budget and eight religious holidays — has simply not been feasible.

7. Any reapportionment plan enacted by the legislature and signed into law requires clearance under the Voting Rights Act. Plaintiffs have suggested that a minimum of 60 days should be allowed for such clearance. In fact, it took the full 60 days to obtain Justice Department clearance of the reapportionment plan enacted in 1972 (*See* Exh. A attached hereto for a brief summary of the type of information required by the Department of Justice).

8. Defendants seek a limited stay of this Court's March 26, 1982 Order because it appears that it will be virtually impossible to reach an agreement with respect to reapportionment by the legislature prior to April 16, or prior to the hearing before this Court on April 19. A stay is required to give the legislative

process more time to work and to prevent the Court from pre-empting the legislative process before it has had a reasonable opportunity to develop a valid reapportionment plan.

s/
.....
John F. Haggerty

Sworn to before me this
9th day of April 1982.

s/
.....
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN FLATEAU, *et al.*,

Plaintiffs,

—*against*—

WARREN M. ANDERSON, *et al.*,

Defendants.

82 Civ. 0876 (VLB)
(Statutory Three-Judge Court)
AFFIDAVIT

RICHARD S. SCOLARO, being duly sworn, deposes and says:

1. I am the attorney for defendant James Emery and am submitting this affidavit in support of his motion for a limited stay of this Court's Order dated March 26, 1982:

(a) Extending the time under which the State is mandated to "devise and enact a constitutional reapportionment plan for the State Senate [and] Assembly" from April 16, 1982 to the end of the 1982 legislative session in December;

(b) Staying that portion of the Court's Order which enjoins the present State Senate and Assembly districting lines from being employed to conduct any election for terms commencing on or after January 1, 1983.

2. This Court apparently concluded that the 1980 census data (available to the Legislative Tax [*sic*] Force for Reapportionment (LATFOR) in September 1981) when applied to existing district lines, demonstrates substantial population variances among the districts and thus, constitutionally compels immediate reapportionment (Opinion, p. 11). Affiant respectfully submits that such a conclusion is erroneous.

3. The data base received in September 1981 was incomplete—in many instances erroneous—and not compatible

with maps and equipment employed by LATFOR. The completion and correction of this demographic data (purging) takes thousands of man hours. Accuracy, even at this date, is questionable.

4. While it is relatively simple to take base data and determine the population of existing districts—particularly since accuracy is neither required nor challenged—it is far more complex and tedious to create constitutionally and statutorily valid new districts.

5. The process of completing, applying and purging the data base has continued in a diligent and timely fashion. The legislature has not delayed this process. To the contrary, members of LATFOR and its staff have worked continuously to enable the legislature to promulgate new district lines in a timely fashion.

6. The Supremacy Clause of the United States Constitution, the one person—one vote rule, is paramount to state requirements and policies (whether of a constitutional, statutory or administrative nature) pertaining to reapportionment. However, to the extent possible, compliance with Article III, section 4 of the New York State Constitution and various statutes which impact on orderly elections must also be achieved. The complexity and application of these provisions has been acknowledged by this Court. Accordingly, the need for precise and complete data in usable form must also be acknowledged.

7. A relatively simple analogy demonstrates the magnitude and complexity of this job. As this Court has noted, the Voting Rights Act of 1965 requires apportionment plans to be precleared by the Justice Department prior to implementation. The statute provides a minimum of 60 days for this review. The Justice Department can extend this period unilaterally. The review of the 1971 New York state apportionment plan took the full 60 day period. Thus, even though all the relevant data was compiled by and submitted by the Joint Legislative Committee on Reapportionment and the Attorney General's office, the Justice Department was unable to assimilate the material and

make its findings for two months. It is hardly unreasonable, therefore, for the legislature to require even more time than the period from September 1981 to the present (approximately seven months) to receive, correct, complete and employ basic data.

8. Moreover, even after the Justice Department has analyzed the data and crystallized its views in a form which would enable the legislature to correct those districts required to be redesigned, there are other considerations. For example, in 1974 one letter of comment from the Assistant Attorney General in charge was issued on April 1, 1974. It was not until May 27, 1974, eight weeks later, that the Joint Legislation Committee on Reapportionment had a bill ready to correct the districts so as to comply with the views of the Department of Justice.

9. To comply with the Voting Rights Act of 1964, the legislature is required to submit election data as well as demographic data on various forms (*see* Exhibit A). Election data is compiled by election districts. This requires that population data be projected on an election district basis, a further detail which requires significant time.

10. This Court recognized that "[a]pportionment is a political and legislative process" (Opinion p. 17). Further, this Court concurs with the opinion expressed by the Supreme Court on numerous occasions that it is appropriate to grant the legislature a reasonable period in which to effect a constitutionally valid plan (Opinion p. 19). The legislature is acting with all possible speed to prepare and pass a new plan of apportionment.

11. Both plaintiff Fink and defendant Anderson have submitted proposed plans in due form to this Court as exhibits. The proposed Fink plans, which were before the Court on March 26, were not in a form which complied with the state requirements, and were in direct violation of the Voting Rights Act. (*See* Zimmerman Affidavit). While the Fink and Anderson plans contained numerous errors, they do serve as a basis for negotiations between the two houses of the legislature.

At present, neither the plan proposed by the Republican members of LATFOR nor the Fink Plan has been purged of errors and put in valid form.

12. In addition to the time required to overcome mere technical problems, there is still another dimension to a legislative solution to this sensitive issue. Unlike the other two branches, the legislative branch does not have a single head or group pinnacle that can commit it to a final position. The legislative branch makes its determinations on the basis of coalitions of interest groups within the political parties. The art of being a legislative leader, such as plaintiffs Fink and Ohrenstein and defendants Anderson and Emery, is to weld these shifting groups into a legally effective force by producing constitutional majorities (31 Senators and 76 Assembly members) capable of final passage in the houses.

13. With many members, individually or in groups of each house on both sides of the aisle, these negotiations cannot be finalized until the technical problems are brought under control so that the appropriate leader can discuss the options which the data and the law (federal and state) permit. These negotiations have continued and are presently continuing. For example, I am informed by Donald Zimmerman and believe that on April 4, 1982 he met with public officals concerning adjustments in Senate and Assembly lines in the proposed plan of the Republican members.

14. Prior to the order of this Court, legislative leaders had conferred on this issue. At the request of this Court these negotiations have continued. Affiant, as Emery's representative, has met on two occasions with representatives of plaintiff Fink. While no agreement has been reached, negotiations are continuing.

15. In light of the above, Affiant respectfully submits that the limited period of twenty-one days from March 27 to April 16 (a time period further reduced by eight religious holidays) is not a reasonable period of time to enact a new apportionment plan.

16. Defendant Emery seeks, therefore, a stay of this Court's Order because it does not appear that a constitutionally valid plan of apportionment can be prepared, agreed to and passed by April 16, 1982 and thus, that a reasonable opportunity to act has not been afforded defendants.

s/
.....
Richard S. Scolaro

Sworn to before me this
9th day of April 1982.

s/
.....
Notary Public